No. 95-31

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

SHANNON RICHEY FAULKNER,

Petitioner,

and the

UNITED STATES OF AMERICA,

Respondent.

v.

JAMES E. JONES, JR., *et al.*,

Respondents/Petitioners.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MEMORANDUM SUGGESTING MOOTNESS OF PETITION FOR WRIT OF CERTIORARI OF SHANNON RICHEY FAULKNER

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Pursuant to Rule 21.2(b) of this Court's Rules, respondents James E. Jones, Jr., *et al.*, ("Respondents") file this memorandum to advise the Court of certain facts which, in Respondents' view, render the writ of certiorari filed by petitioner Shanon Richey Faulkner moot.

STATEMENT

On July 10, 1995, Faulkner petitioned this Court to review the Fourth Circuit's decision in *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995), holding that the State of South Carolina's failure to provide women an all-female military education substantively comparable to that offered to men at The Citadel violated the Equal Protection Clause. In light of Faulkner's unique status as a rising college junior, the court fashioned a bifurcated remedy. The court provided "special, conditional relief for Faulkner, requiring that she be admitted to the Corps of Cadets unless, before the beginning of Faulkner's junior year, the state provide[d] a parallel program [for women]." 51 F.3d at 450. As for all other women, the State was allowed to formulate its own remedy that would offer women an educational experience substantively comparable to that which the State provided for men.

Accordingly, on August 12, 1995, Faulkner arrived at The Citadel as a prospective member of the Corps of Cadets. On August 18, 1995, however, Faulkner voluntarily withdrew from The Citadel.

ARGUMENT

Clearly, Faulkner's voluntary withdrawal from The Citadel has removed any personal stake that she had in this matter. Her lawyers admit that she "is not currently pursuing a Citadel education" and is not even "interested" in doing so. Motion of Nancy Mellette to Add Party or to Intervene, dated September 11, 1995, at 5, 17a.

Still, while her lawyers acknowledge "the potential argument that her claims are moot" – an understatement, to say the least – and concede that her petition is "endangered," Motion of Nancy Mellette at 5, 8, they refuse to dismiss her petition for certiorari and, indeed, have argued in the district court that her claim for admission to The Citadel, despite her voluntary withdrawal, is not moot and should therefore not be dismissed.[1] As the United States in its capacity as plaintiff-intervenor has succinctly stated, "petitioner's [Faulkner's] withdrawal from The Citadel renders her individual claim moot." Memorandum for the United States in Opposition at 7 n.4, *Faulkner v. Jones* (No. 95-31).

Under Article III of the United States Constitution, "[i]t is well settled that federal courts may act only in the context of a justiciable case or controversy." *SEC v. Medical Comm. for Human Rights*, 404 U.S. 403, 407 (1972) (quoting *Benton v. Maryland*, 395 U.S. 784, 788 (1969)). If there is no actual controversy between the litigants, a case is by definition moot and therefore not justiciable. As the Court has explained, "[t]he rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 460 n.10 (1974). Accordingly, the Court has repeatedly held that a case is moot

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[1] Acknowledging the potential mootness of Faulkner's petition, Faulkner's lawyers have filed a motion seeking leave of this Court to effectively substitute another person as their petitioner in these proceedings. As we shall demonstrate in our forthcoming opposition to this motion, Faulkner's lawyers cannot resuscitate Faulkner's mooted petition, and their motion should be rejected.

where a subsequent change in the relevant facts or law negates the existence of an actual controversy. *See, e.g., Weinstein v. Bradford,* 423 U.S. 147 (1975) (plaintiff's challenge to certain procedural rights in considering parole eligibility were moot on account of his complete release from supervision); *Preiser v. Newkirk,* 422 U.S. 395 (1975) (plaintiff's due process challenge to the adequacy of procedures for transferring prisoners to maximum security facilities rendered moot by his subsequent transfer to a medium security prison); *North Carolina v. Rice,* 404 U.S. 244, 246 (1971) (plaintiff's challenge to a drunk-driving sentence after he had been completely discharged was moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them"); *DeFunis v. Odegaard,* 416 U.S. 312, 317 (1974) (student's challenge to state law school's admissions policy rendered moot by his registering for the final quarter of law school since "[t]he controversy between the parties has thus clearly ceased to be 'definite and concrete' and no longer 'touch[es] the legal relations of parties having adverse legal interests' ") (quoting *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240-41 (1937)); *Pasadena City Bd. of Educ. v. Spangler,* 427 U.S. 424, 430 (1976) (equal protection challenge to the racial composition of local public schools "clearly moot" since plaintiff students had graduated and "no longer ha[d] any stake in [the case's] outcome"); *Church of Scientology v. United States,* ___ U.S. ___, 113 S.Ct. 447, 449 (1992) ("[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to

a prevailing party, the appeal must be dismissed") (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

As previously mentioned, Faulkner has opposed a motion filed in the district court to dismiss her claim as moot. Faulkner's opposition is based on her assurances that if women were admitted to The Citadel, she would "consider re-applying." Affidavit of Shannon Faulkner ("Faulkner aff."), dated September 12, 1995, attached to Memorandum in Opposition to Motion to Dismiss Plaintiff Faulkner ("Memorandum") (App. 7). She argues that she still has a personal stake in the outcome of this litigation because she *may* seek readmission at some unspecific time in the future if, but only if, other women are admitted. Memorandum at 2 (App. 2). Under Article III, however, a justiciable controversy must be current and cannot be predicated on mere speculation that such a controversy may arise in the future. *See, e.g., O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (a plaintiff's injury "must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' ") (quoting *Golden v. Zwickler*, 394 U.S. 103, 109 (1969); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (alleged injury must be "actual or imminent,' not 'conjectural' or 'hypothetical' ") (quoting [*Whitmore v. Arkansas*, 495 U.S. 149, 155 (1991)] (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983))). Thus, despite Faulkner's assurance in the district court that, although she does "not know where the future leads," Faulkner Aff. at 2 (App. 7), it may someday lead her to seek admission to The Citadel, her petition is moot since she "is not currently interested in pursuing a

Citadel education." Motion of Nancy Mellette to Intervene at 17a.

Faulkner has also argued in the district court that her case falls within the exception to the mootness doctrine for controversies that are "capable of repetition, yet evading review." *DeFunis*, 416 U.S. at 318 (quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)); Memorandum at 3 (App. 3-4). Yet, this exception applies only where "two elements combine: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein*, 423 U.S. at 149. Faulkner cannot satisfy either element. The alleged constitutional violation, denial of admission to The Citadel, extends over four years and as the history of this case demonstrates will not evade review. Furthermore, Faulkner has failed to demonstrate with any degree of certainty that she will again seek admission to The Citadel. *See, e.g., Murphy v. Hunt*, 455 U.S. 478, 482 (1982) ("The Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the test stated in *Weinstein*."). Not surprisingly, Faulkner is unable to cite any authority to support her remarkable suggestion that a plaintiff who voluntarily renounces the relief she sought (and received) may continue to litigate the case because she *may* again be denied that relief *if* she someday renews her claim.

Faulkner also claims to have a personal stake in this case because there is a motion pending in the district

court for certification of a class. (App. 3). To support this proposition, Faulkner cites *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980). *Geraghty*, however, merely held that a denial of class certification may be appealed even after the named plaintiff's individual claim becomes moot. The *Geraghty* Court made clear that a plaintiff who has no personal stake in the outcome of the case at the time the class certification request is decided cannot prevent the mootness of the action. 445 U.S. at 404 n.11. Thus, *Geraghty* expressly precludes the result Faulkner seeks to achieve.

CONCLUSION

For the foregoing reasons, Respondents suggest that Faulkner's request for review is moot and her petition for a writ of certiorari should therefore be dismissed.[2]

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[2] Alternatively, the Court may wish, in light of the mootness of Faulkner's claims, to grant Faulkner's petition, vacate the court of appeals' judgment insofar as it relates exclusively to Faulkner and provides relief unique to Faulkner, and partially remand to the court of appeals with directions that it instruct the district court to dismiss those aspects of this case as moot. *See United States v. Munsingwear*, 340 U.S. 36 (1950). *See also Deakins v. Monaghan*, 484 U.S. 193, 199-200 (1988); *CIA v. Holy Spirit Ass'n*, 455 U.S. 997 (1982).

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

SHANNON RICHEY FAULKNER, individually and on behalf of all others similarly situated, Plaintiff-Intervenor, v. and the UNITED STATES of AMERICA, Plaintiff-Intervenor, v. JAMES E. JONES, Jr., et al. Defendants, and the STATE OF SOUTH CAROLINA, et al., Additional Defendants.	CASE NO. 2:93-0488-2 MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS PLAINTIFF FAULKNER

Defendants maintain that with Plaintiff Faulkner entering and withdrawing from the Corps of Cadets in August of 1995, the claims she presented are moot. While Plaintiff filed her claim as a class action and has made motions to certify the case at different times, there has been no ruling as to class certification. The Defendants claim that since the class is not yet certified and the injunctive rulings have applied solely to Plaintiff Faulkner despite her request for class relief, she should be dismissed from this case.

Plaintiff submits that her case is not moot for two reasons: (1) Plaintiff still has a legally cognizable interest in the outcome; and (2) extraordinary conditions exist which negate Defendant's claims of mootness.

(a) Plaintiff Faulkner still has a legally cognizable interest in the outcome of this litigation.

A case may become moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496 (1969). In the case at hand, it is clear the issues are still "live" since the United States itself is a plaintiff-intervenor and another individual (Nancy Mellette) seeks to intervene, and no party to this case contends that the underlying legal issue of discrimination by Defendants is resolved. Additionally, Plaintiff Faulkner asserts that she still has a legally cognizable interest in the outcome of this suit. While Faulkner initially withdrew from The Citadel on August 18, 1995, Faulkner contends that males who have withdrawn from The Citadel have been re-admitted. In her Affidavit (See Exhibit A, Affidavit of Shannon Richey Faulkner), Faulkner states that she is still interested in attending and graduating from The Citadel, but would not re-apply without the presence of other women. Faulkner, like males who withdraw from The Citadel, has the right to re-apply for admission. The Citadel implies that because Faulkner withdrew she forfeited her right to re-enter, which is not the case. In fact, this interpretation perpetuates the Defendants' policy of treating males different from females.

Additionally, Faulkner still has an interest in the class action aspect of this case, which has yet to be ruled upon. In Defendant's motion to dismiss Faulkner, they rely upon *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 430 (1976). However, in *United States Parole Commission v. Geraghty*, 445 U.S. 387, note 7 (1980) the Supreme Court limited the holding of *Pasadena* to the facts presented.

The case is not moot. A controversy still exists in Faulkner's right to be afforded the same rights entitled to males at The Citadel, including the right to attend, the right to withdraw, and the right of re-admission.

(b) Extraordinary conditions exist which negate Defendants' claim of mootness.

Federal Courts have long recognized that cases raising substantial issues should not be dismissed for technical jurisdictional reasons where the only effect of the dismissal is simply the renewal of the lawsuit. See *United States v. W.T. Grant Co.*, 345 U.S. 629 (1983). For instance, in *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911), the Supreme Court held an action over an expired order was not moot since the issues were "capable of repetition, yet evading review" 219 U.S. at 515. The Supreme Court used similar reasoning in *Moore v. Ogilive*, 394 U.S. 814 (1969) to declare a "continuing controversy" existed regarding candidates in a prior election and rejected arguments of mootness. 394 U.S. at 816.

There can be no question that the issues presented are "capable of repetition, yet evading review" due to the hundreds of inquiries from women who The Citadel will

not even let apply due to their gender. Lastly, Faulkner's personal situation is capable of direct repetition. Should Faulkner seek re-admission, as stated in her affidavit, she would be forced to re-institute litigation to secure equal rights in the re-admission process.

No one can dispute that Faulkner entered and left the Citadel under unique, difficult and novel circumstances. Faulkner asserts that she has a continuing interest in this case and that the equities mandate her remaining a party. For the foregoing reasons, Defendants' motion to dismiss Faulkner as a party should be denied.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

SHANNON RICHEY FAULKNER, individually and on behalf of all others similarly situated, Plaintiff-Intervenor, v. and the UNITED STATES of AMERICA, Plaintiff-Intervenor, v. JAMES E. JONES, Jr., et al. Defendants, and the STATE OF SOUTH CAROLINA, et al., Additional Defendants.	CASE NO. 2:93-0488-2

AFFIDAVIT OF SHANNON RICHEY FAULKNER

Shannon Richey Faulkner, being duly sworn, states the following:

1. I am the Plaintiff in this action. I filed this action as a class action on behalf of myself and other women similarly situated. In August of 1995, I was admitted to the Citadel and withdrew from the Citadel on August 18, 1995. I withdrew due to severe stress from the situation. Due to stress, I could not keep my food in my stomach. Much of this stress was from the litigation itself. However, a great deal of stress was from being the only

woman at the Citadel, the constant presence of the press, and the feeling that the entire world judged every mistake, mishap and movement I made. From this stress and the feeling that I could not trust anyone with my feelings since the persons surrounding me in the infirmary had testified against my admission. I really could not foresee any situation changing. Being this upset, I chose to withdraw from The Citadel. Even the process of deciding to stay or leave added stress;

2. When I decided to withdraw, I knew that I was under a great deal of stress. I have never been so emotional in my life. Looking back, I cannot believe how the situation evolved into emotional catastrophe for me. I usually am not very emotional and try to avoid making decisions based upon my feelings. I did not want to make a final decision to leave the Citadel, and knew that my state of mind was not rational. I asked General Poole if I could have a medical discharge to see another doctor and seek another medical opinion (besides the opinion of Dr. Robinson, who testified against me even being there and submitted an affidavit attempting to block my admission). General Poole told me that this was not an option.

3. Under the circumstances, I believe it was the best thing for me to withdraw from the Citadel. However, I do believe that the Citadel was not truly interested in my staying. I now recognize that it was an impossible task to require myself to perform under the world's spotlight in surroundings where I did not have even a person to confide in. Being completely cut off from the outside world, except for the glare of cameras, I felt stranded, isolated and hated.

4. I am not attending college at this time. Instead, I am using this time to reflect and determine my future. I am also beginning counseling to help me deal with stress and eliminate the effects stress has had on my life.

5. While I do not know where the future leads me, I still fundamentally believe in the justice of my case. I also believe that had other women been with me, the outcome might have been different. I often think about how different it would be with other women to share the burdens and challenges of being the "first".

6. I understand that there are other women who have inquired into admission to The Citadel, and others, such as Nancy Mellette, who are already determined to attend. I understand that other Citadel students have withdrawn from the Citadel and been re-admitted upon application. If other women were present at the Citadel, I would definitely consider re-applying to finish my degree at The Citadel. I attended day-classes at The Citadel for approximately a year and a half. All of my credits have been accepted by transfer by The Citadel or originated at The Citadel. I am classified as an incoming Junior. I do have a concern about my credits fully transferring in another college since I am in upper-level courses now. Additionally, I still respect The Citadel as a school and still think about wearing "The Ring". However, I do not want to be alone again.

7. When I entered The Citadel, I truly did not fathom the burden I put on myself by being the only one. I do not think anyone could truly foresee the awful feeling this was.

8. I do not believe the gates of The Citadel should be shut on me for trying to accomplish the impossible. The Citadel re-admits male cadets who leave under much different reasons. I have not foreclosed the option of requesting re-admission from The Citadel; However, I would not go in alone again.

9. I filed this action as a class action. My interests have not changed at all since the day I filed this action. I fought for the right to be treated equally. I still desire this right, including the right to be re-admitted with other women. I request this Court deny The Citadel's motion to dismiss me as a Plaintiff. I still stand ready to serve as a class representative, as I requested years ago, and still am detrimentally affected by The Citadel's state-sanctioned policy of treating me different from males.

/s/ Shannon Richey Faulkner
Shannon Richey Faulkner

Date: 12 Sept 95

SWORN TO BEFORE ME THIS
12 day of September, 1995.
/s/ Suzanne E. Coe
Notary Public for South Carolina
My Commission Expires: 5/6/2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

SHANNON RICHEY FAULKNER, individually and on behalf of all others similarly situated, Plaintiff-Intervenor, v. and the UNITED STATES of AMERICA, Plaintiff-Intervenor, v. JAMES E. JONES, Jr., et. al. Defendants, and the STATE OF SOUTH CAROLINA, et. al., Additional Defendants.	CASE NO. 2:93-0488-2 AFFIDAVIT OF ALBERT EDWARD FAULKNER, JR.

PERSONALLY APPEARED BEFORE ME, ALBERT EDWARD FAULKNER, JR., being duly sworn, and states:

1. I am the father of Shannon Richey Faulkner, the Plaintiff in this action;

2. I went to Charleston on August 18, 1995, due to a call we received from Shannon about her stomach and her desire to return home;

3. Along with Suzanne Coe and my son Todd, I went to The Citadel to check on Shannon;

4. When we arrived at the Infirmary, we went to Shannon's room. I have never, in the twenty years I have raised Shannon, seen her as emotional and irrational as that day. She was hysterical, said she could not take the pain of her stomach and stress anymore and wanted to come home. As a parent, I have never felt so powerless in my life. I know that Shannon truly did want to attend The Citadel and graduate. I also know that on August 18, 1995, my heart broke when I saw how difficult and lonely this was for her. Throughout this, General Poole kept coming in and asking "What are you going to do", to us all. We would respond that we were talking and needed time. Shannon asked him, in my presence, if she could have a medical leave to consult another doctor about the pain in her stomach and stress. General Poole told her this was not possible. When we had been in the room about 45 minutes with Shannon, General Poole pulled me aside and told me Shannon had 15 minutes to make a "final" decision to stay or go. He told me that if she was not in "formation" in 15 minutes, she would have to withdraw. At this point, Shannon was so upset that I was powerless to do anything about it. During the approximate 45 minute session we had with Shannon, we tried to get her other counsel on the phone and let her know how everyone was behind her. When the nurse (Beth Summerford, who testified against Shannon before this Court) learned that we were using the phone, she sent someone in to take it out of the wall to further cut Shannon off. I was in disbelief at the pettiness.

When our 15 minutes were up, Shannon was still hysterical. There was no way she could be in formation. General Poole came in the room, and asked for either an

immediate decision or for Shannon to go to formation immediately. That was when Shannon told them she desired to withdraw.

5. During this entire process, a massive press entourage was gathered outside the infirmary, in Shannon's direct view. She would look out the window and cry, holding her stomach.

6. While in with Shannon, I saw what kind of stress she really was under. I have never actually "felt" loneliness coming from someone like I did in her infirmary room. It is a feeling I never hope to feel again.

7. I have no doubt that Shannon left The Citadel under extreme stress. We have now engaged counseling services to help her deal with her feelings regarding the litigation. The family is helping Shannon determine her future. Everyday, her feelings about her future are brighter. She has repeatedly told us that it would have been different if she had not been alone. Shannon has stated repeatedly to me and other family members that if other women were present, she would consider finishing her education at The Citadel.

As always, we support Shannon and any plans for her future. Should she decide to apply for re-admission to The Citadel, we would support her decision. However, we would require that this time she not be alone.

/s/ Albert E. Faulkner, Jr.
ALBERT EDWARD FAULKNER, JR.

SWORN TO BEFORE ME
THIS 12 day of September, 1995.

/s/ Suzanne E. Coe
Notary Public for South Carolina
My Commission Expires: 5/6/2002